CROWELL & MORING
1001 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2595
(202) 624-2500
CABLE: CROMOR
FACSIMILE (RAPICOM): 202-628-5116
W. U. I. (INTERNATIONAL) 64344
W. U. (DOMESTIC) 89-2448

SUITE 1200
2010 MAIN STREET
IRVINE, CALIFORNIA 92714-7217
(714) 263-8400
FACSIMILE (714) 263-8414

DENNING HOUSE
90 CHANCERY LANE
LONDON WC2A 1ED
44-71-413-0011
FACSIMILE 44-71-413-0333

March 17, 1995

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: PR Docket No. 94-106

Dear Mr. Caton:

Transmitted herewith for filing with the Commission are an original and four copies of the "Supplemental Reply Comments of the Bell Atlantic Metro Mobile Companies" in the above-referenced proceeding.

Should there be any questions regarding this matter, please communicate with this office.

Very truly yours,

John T. Scott, III

John T. Scott, III

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Connecticut Department of	)	PR Docket No. 94-106
Public Utility Control to Retain Regulatory	)	
Control of the Rates of Wholesale Cellular	)	
Providers in the State of Connecticut	)	

SUPPLEMENTAL REPLY COMMENTS OF THE BELL ATLANTIC METRO MOBILE COMPANIES

John T. Scott, III
Charon J. Harris
CROWELL & MORING
1001 Pennsylvania Avenue N.W.
Washington, D.C. 20004
(202) 624-2500

Their Attorneys

March 17, 1995

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Providers in the State of Connecticut	)	PR Docket No. 94-106

SUPPLEMENTAL REPLY COMMENTS OF THE BELL ATLANTIC METRO MOBILE COMPANIES

The Bell Atlantic Metro Mobile Companies ("BAMM"),[1/] by their attorneys, submit these comments pursuant to the Commission Staff 's Order allowing a further round of comments in this proceeding.[2/]

I. SUMMARY

Only two parties filed initial comments in this round. Both merely repeat the same conclusory assertions they previously made and contribute nothing. The record no more justifies grant of the DPUC's Petition than it did five months ago,

---

1/ The Bell Atlantic Metro Mobile Companies operate cellular telephone systems in five Connecticut markets. The names of the companies and markets are: Metro Mobile CTS of Hartford, Inc. (Hartford MSA), Metro Mobile CTS of New Haven, Inc. (New Haven MSA), Metro Mobile CTS of New London, Inc. (New London MSA), Metro Mobile CTS of Fairfield County, Inc. (Bridgeport), and Metro Mobile CTS of Windham, Inc. (CT-2 RSA).

2/ Order, PR Docket No. 94-106, DA 95-111, released February 9, 1995. The comment dates were later extended to March 10 and March 17, 1995, by a second Order (DA 95-348, released February 24, 1995).

when the first comment period ended. The Petition simply does not meet the statutory standard for granting the DPUC its request to continue rate regulation of the cellular industry in Connecticut. Grant would eviscerate that legal standard, contradict the Commission's own findings as to rate regulation of mobile services, and perpetuate an inequitable scheme whose burdens are not balanced by any tangible protections to subscribers. The Commission has had the DPUC's Petition for more than seven months. It is time to deny it.

II. THE SUPPLEMENTAL COMMENTERS ADD NOTHING NEW AND REPEAT THE LEGAL AND FACTUAL MISSTATEMENTS OF THEIR INITIAL COMMENTS.

The Commission opened this supplemental comment period to give the parties an opportunity to comment on materials from the DPUC's proceeding.[3/] The only parties to comment were two of the many resellers offering services in the state, Connecticut Telephone and Communications Systems, Inc. and Connecticut Mobilecom, Inc. ("Resellers"), and the Connecticut Attorney General's Office ("AG"). Instead of doing what the Order requested -- evaluating the DPUC's factual record -- the two commenters do not address that record at all, but instead

---

3/ BAMM did not file supplemental comments because it had addressed the DPUC record in detail in its Opposition to the Petition, filed September 19, 1994. On February 16, 1995, BAMM filed an Application for Review of Commission Staff 's Order scheduling the new comment period, because all parties had been given adequate opportunity to debate the DPUC record last fall, and thus a new comment period would yield no new information but only prolong this proceeding. BAMM also opposed the Order because it appeared to grant preferential treatment to the DPUC, and directed a new comment period contrary to the express language of Section 20.13(a)(5) of the Rules. BAMM's Application for Review is pending.

rehash the same assertions they previously made in the initial comment round last fall. Worse, even though the numerous factual and legal errors in those assertions were pointed out to them by other parties, they repeat them without even attempting to respond to those defects. Their comments can be quickly discarded.

1. The Resellers again claim that the Petition does not "seek wholesale preemption of the Commission's regulation of cellular telephone rates," but is "reasonably scaled" to allow the DPUC "limited," temporary regulation. (Comments at 1-2.) One would certainly hope that the DPUC is not seeking to preempt the Commission. In any event, the claim that only temporary authority is sought is untrue. (See BAMM Reply, October 16, 1994, at 6.) The DPUC has not agreed to any such "sunset" nor has it requested (unlike its counterpart in California) regulation only until a particular date. To the contrary, it has said that it plans to launch a flurry of new investigations.[4/] Far from promising an end

---

[4/] The DPUC plans to begin proceedings to, among other things, (1) "review in greater detail each carrier's rate of return" (Decision at 11); (2) "investigate the competitive practices of the cellular carriers" (Id. at 27); (3) "review the wholesale carrier and retail affiliate relationships of Springwich/SNET Cellular and BAMM" (Id.); and (4) "review the relationship between the cellular carriers' costs and their respective rates and charges" (Id. at 28).

If the results of these proceedings so warrant, the DPUC would at that time be entitled to file a new petition to the FCC under Section 332(c)(3)(A). But the fact that the DPUC believes that new proceedings are needed to assess competitive conditions is further evidence that it has not, at this time, qualified under Section 332(c)(3)(B), the provision governing petitions to maintain existing regulation.

to cellular regulation as of a date certain, the DPUC's Petition is the first step in its agenda to expand regulation.

2. The Resellers' Supplemental Comments are not tied to the record, but merely quote the DPUC's Petition. They then attach virtually the same brief that they filed twice before, once with the DPUC and once with this Commission. BAMM and other parties have already shown in detail why the Petition did not correctly summarize the DPUC's underlying Decision and why, in any event, the purported "findings" in the Petition cited by the Resellers were wrong.[5/] Those pleadings rebut each of the arguments the Resellers try to resurrect. For example:

-- Claims of improper relationships between carriers and their reseller affiliates: Aside from being factually wrong, the claims are irrelevant to a petition to regulate rates, because they in no way demonstrate consumers are vulnerable to unjust rates as Section 332(c) requires. BAMM Opposition at 21-25; Appendix A at 17-24.

-- Objections to volume discounts: Such discounts have been repeatedly approved by the Commission -- and by the DPUC itself. BAMM Opposition at 20-21; Appendix A at 22-23.

-- Claim of excessive rates of return: The Reseller's claim here resulted from improper calculations, including switching data from BAMM and Springwich, and was rebutted by expert testimony that showed rates of return were below 15% -- a

---

5/ In addition to demonstrating why the DPUC's Petition mischaracterized the record and, in any event, failed to meet the Section 332(c) standard, BAMM has provided a point-by-point discussion of each DPUC finding as well as a statement from an economist explaining why the carriers' rates of return were at or below competitive levels. BAMM Opposition at 10-25; Appendix A at 1-27; Appendix B. Other carriers filed similarly detailed showings.

level even the DPUC conceded was reasonable. BAMM Opp. at 11-15; Appendix A at 3-5.[6/]

-- Claims as to HHI: Were the Commission to rely on Connecticut HHI figures -- which are no higher in Connecticut than other states -- it would undercut its own findings that a duopoly market structure does not justify tariff regulation. BAMM Opp. at 16-17; Appendix A at 13-14; Hausman Statement at 6-9.

3. The Resellers effectively concede that the DPUC was unable to find that cellular rates were unreasonable. They attack BAMM for stating in its Application for Review of the Order that the DPUC has found the crucial evidence regarding cellular carriers' rates of return to be inconclusive -- even though BAMM was merely quoting the DPUC's own finding. (Decision at 11.) But the Resellers then admit BAMM's point by noting that, because of the "disparity" of the evidence on rates of return, the DPUC "concluded that it should hold additional hearings to determine what a reasonable rate should be." (Comments at 2.) If the DPUC could not make that determination, by definition it could not find rates unreasonable, and it in fact did not. That in and of itself is fatal to the DPUC's Petition, because under applicable law the petitioning state must demonstrate that regulation is necessary to protect consumers from unjust rates. The Resellers ignore that law. See 47 U.S.C. § 332(c)(3)(B); 47 C.F.R. § 20.13(a).

6/ The Commission should take note of the fact that the February 9 Order for new comments also solicited comments on BAMM's and Springwich's rate of return data which had been filed as late-filed exhibits in the DPUC proceeding and subsequently with the Commission. Order at ¶ 40. That data showed specific rates of return below rates expected for competitive services. Yet the Resellers (as well as the AG) ignore the data entirely.

Nothing in their Comments addresses consumer protection at all, let alone how the DPUC's scheme provides that protection.

4. The AG also fails to add any new arguments or analysis in support of the Petition but merely asks the Commission to accord deference to the DPUC "as long as there is supporting evidence for the DPUC's conclusions." (Comments at 8-9.) The AG lists seriatim all of the procedural steps that the DPUC took to compile the record in the state proceeding and argues that this extensive process warrants such deference, as if a lengthy proceeding guarantees a proper result. It does not. To the contrary, applying a "deference" standard would be flatly in violation of Section 332 and the Commission's Rules. (BAMM Reply at 5.) The Budget Act did not direct the Commission to defer to the findings of the states. States must present evidence that market conditions "fail to protect subscribers from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." 47 U.S.C. § 332(c)(3)(A), and they bear "the burden of proof," 47 C.F.R. § 20.13(a)(5).[7/]

7/ See Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order, 9 FCC Rcd. 1411, 1421 (1994): "States must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers."

If anything, the extensive DPUC proceeding supports BAMM's argument that the agency had every opportunity to examine rates of return and conclude that they were unreasonable. The DPUC nonetheless found that "the record of this proceeding is inconclusive relative to the cellular carriers rate of return and their financial performance since 1987." Decision at 11.

5. The AG again misstates the legal standard by asserting that the Connecticut wholesale cellular market lacks "effective competition" and that this justifies rate regulation. (Comments at 5.) Section 332 asks, however, not what level of competition exists in the abstract but whether market conditions "fail to protect subscribers adequately from unjust and unreasonable rates." The AG does not explain or cite any evidence as to why this standard is met.

6. The AG's claim that there are no other services that are substitutable for cellular service (Id.) is also wrong as a matter of law. After a comprehensive analysis of the CMRS market, the Commission recently concluded that paging, SMR and PCS are all competitors to cellular because their services are, to an increasing degree, substitutable.[8/] The AG is thus left only with the argument that the Petition should be granted because wholesale cellular is a duopoly. Yet all U.S. cellular markets are duopolies, and both Section 332(c) and the Commission's Rules, of course, require more than the evidence of a duopoly market structure to grant a petition. The AG, however, offers nothing more.

III. THE RECORD STILL FAILS TO PROVIDE ANY LEGAL BASIS FOR GRANTING THE DPUC'S PETITION.

When the rhetoric of the Resellers and the AG is stripped away, their Supplemental Comments provide the Commission with no substantive analysis which can help it resolve this proceeding, and should be discarded.

8/ Implementation of Sections 3(n) and 332 of the Communications Act, Third Report and Order, 9 FCC Rcd. 7988, 8012-35 (1994).

The Commission is thus left with the DPUC's Petition and the detailed comments on it filed last fall, principally by CMRS providers serving Connecticut. That record establishes four critical points which not only justify but compel denial of the DPUC's Petition. Indeed BAMM believes that a grant of this Petition would unlawfully conflict with the Commission's own actions in its CMRS proceedings and would also directly violate Section 332(c).

First, there is nothing in the record which demonstrates that the CMRS market in Connecticut suffers from any special competitive weaknesses that justify special regulation. Congress already determined that rate regulation at a state level should be preempted unless a state shows why its specific situation warrants an exception. This Commission, reviewing the CMRS industry nationwide, concluded that tariff regulation such as the DPUC's scheme is not only unnecessary to protect consumers but is actually harmful. Second Report and Order, 9 FCC Rcd. at 1479. For this reason, it correctly required a state to come forward with specific evidence of why it should be permitted to depart from Congress' general goal and from the Commission's own findings as to the harms of tariffing.

Neither the DPUC, nor the few parties that support it in this proceeding, have ever attempted to make that showing of special conditions. Instead, they time and again argue merely that "duopoly is bad." That, of course, is not the standard -- if it were, this Commission could not have forborne from rate regulation. In fact, it found that duopoly itself does not justify rate regulation. The DPUC ignores that critical finding. Granting its Petition would undo the

Commission's own rationale for forbearance. Moreover, the record contains ample evidence of competition among carriers and declining prices -- the same type of evidence that the Commission relied on to forbear from rate regulation.[9/]

Second, the DPUC never attempted to explain, let alone prove, how its wholesale rate regulation scheme is necessary to protect subscribers, as Section 332(c) requires, nor is there any record evidence on that crucial issue. There is no evidence as to competitive conditions at the subscriber level, evidence of how consumers in Connecticut are vulnerable to unjust rates, or why wholesale rate regulation is necessary to protect them from unjust and unreasonable rates. The DPUC has not, as it must under Section 332(c), shown the causal connection between its scheme and consumer protection. That nexus, however, is precisely what Congress required before a state may gain an exception from the general rule of preemption. (See BAMM Opposition at 7-10.) Given that the DPUC's scheme is limited to wholesale rates (and indeed sets minimum as well as maximum wholesale prices), there is no rational connection between the DPUC's scheme and protection for end users, and the DPUC has not even asserted any. That also requires denial of the Petition as a matter of law.

9/ The carriers' initial comments to the Commission discussed the record evidence specific to Connecticut of declining prices, high rates of subscriber growth, increased geographic coverage, introduction of new services to the public, growth in the number of CMRS providers. Opposition of BAMM at 11; 12-25; Appendix A at 6-7; 25-27; Comments of Springwich at 4, 13-14, 22; Opposition of McCaw at 21.

The record also contained no customer complaints, and no evidence of customer dissatisfaction, at all. Id.; See Section 20.13(a)(2)(viii).

Third, the DPUC's scheme is discriminatory, and directly violates the command of regulatory parity in Section 332, because it burdens only the cellular carriers but not their CMRS competitors. One of Congress' cardinal goals in revising that section was to achieve parity among competitors in the CMRS market. To that end, the Conference Committee directed the Commission, in considering a state petition, to "ensure" that, "consistent with the public interest, similar services are accorded similar regulatory treatment." H. Conf. Rep. No. 103-213 at 494 (emphasis added). The Commission has repeatedly held that consistent regulation is essential to promote vigorous and fair competition. Allowing the DPUC's cellular-only scheme to remain in place would undermine that critical legal principle. For this reason as well, the Commission must as a matter of law deny the Petition.

Fourth, the DPUC's Petition looks backward by refusing to consider new CMRS entrants. But its own prior decisions, as well as logic, require this Commission to look forward at what is occurring in the Connecticut CMRS market -- changes that have occurred since last summer when the Petition was filed. The Commission has already concluded that rate regulation is unnecessary because "cellular providers do face some competition today, and the strength of competition will increase in the near future." Second Report and Order, 9 FCC Rcd. at 1478. It has issued an MTA PCS license to Omnipoint to serve all of Connecticut, and this week it auctioned a second license to the largest winner of PCS licenses, the Sprint consortium. The nation's largest SMR carrier, Nextel, has been

constructing sites in Connecticut and is actively participating in other DPUC proceedings. These carriers will operate entirely free of any rate or other regulation, because the DPUC has no legal authority to regulate rates of any CMRS service other than cellular.

Fifth, the DPUC itself was unable to make conclusive findings on critical issues, such as whether carriers' rates of return were excessive. What it did decide was that further investigations were needed to resolve those issues. (See supra, n.4.) On its face, therefore the DPUC's Petition does not satisfy Section 332(c). Should the DPUC conduct these new investigations, it could then seek regulatory authority over rates from the Commission. But at this time, and given the inconclusiveness of the DPUC's proceeding, granting it continued authority to regulate rates would be unwarranted and legally improper.

IV. CONCLUSION

The DPUC has failed to prove that market conditions in Connecticut fail to protect CMRS consumers from unjust and unreasonable rates, and that its regulatory scheme is necessary to provide such protection. The commenters have provided no new arguments or evidence to support the Petition. It has now been more than seven months since the DPUC filed its Petition, thereby securing the right to perpetuate its rate regime until this Commission acts. It is time for the Commission to do so, and deny the Petition.

Respectfully submitted,

THE BELL ATLANTIC METRO MOBILE COMPANIES

By: John T. Scott, III

John T. Scott, III
Charon J. Harris
CROWELL & MORING
1001 Pennsylvania Avenue N.W.
Washington, D.C. 20004
(202) 624-2500

Their Attorneys

March 17, 1995

CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of March, 1995, caused copies of the foregoing "Reply Comments of the Bell Atlantic Metro Mobile Companies" to be sent by hand delivery (indicated by an *) or by first class mail to the following:

Chairman Reed E. Hundt*
Federal Communications Commission
1919 M Street N.W.
Room 814
Washington, D.C. 20554

Commissioner James H. Quello*
Federal Communications Commission
1919 M Street N.W.
Room 802
Washington, D.C. 20554

Commissioner Andrew C. Barrett*
Federal Communications Commission
1919 M Street N.W.
Room 826
Washington, D.C. 20554

Commissioner Rachelle B. Chong*
Federal Communications Commission
1919 M Street N.W.
Room 844
Washington, D.C. 20554

Commissioner Susan Ness*
Federal Communications Commission
1919 M Street N.W.
Room 832
Washington, D.C. 20554

Regina M. Keeney*
Chief, Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street N.W. Room 5002
Washington, D.C. 20554

William E. Kennard*
General Counsel
Federal Communications Commission
1919 M Street N.W. Room 614
Washington, D.C. 20554

Michael Wack*
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street N.W. Room 5202
Washington, D.C. 20554

Stan Wiggins*
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street N.W. Room 5202
Washington, D.C. 20554

Reginald J. Smith
Chairman
Department of Public Utility Control
One Central Park Plaza
New Britain, CT 06051

Mark J. Golden
Acting President
Personal Communications Industry Association
1019 Nineteenth Street, N.W.
Suite 1100
Washington, D.C. 20036

Elizabeth R. Sachs
Lukas, McGowan, Nace & Gutierrez
1111 19th Street, N.W.
Suite 1200
Washington, D.C. 20036

Valerie J. Bryan
State of Connecticut
Office of Consumer Counsel
136 Main Street
Suite 501
New Britain, Connecticut 06051-4225

James A. Kirkland
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004

Russell H. Fox
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005

Jean L. Kiddoo
Swidler & Berlin, Chtd.
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007

Phillip Rosario
Assistant Attorney General
State of Connecticut
One Central Park Plaza
New Britain, Connecticut 06050

Thomas Gutierrez
Lukas, McGowan, Nace &
Gutierrez, Chartered
1111 Nineteenth Street, N.W.
Suite 1200
Washington, D.C. 20036

Michael F. Altschul
Cellular Telecommunications Industry
Association
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

Joel H. Levy
Cohn and Marks
Suite 600
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Leonard J. Kennedy
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, D.C. 20037

Paul E. Knag
Cummings & Lockwood
CityPlace I - 36th Floor
Hartford, Connecticut 06103

Donald J. Evans
McFadden, Evans & Sill
1627 Eye Street, N.W., #810
Washington, D.C. 20006

Judith St. Ledger-Roty
Reed Smith Shaw & McClay
1200 18th Street N.W.
Washington, D.C. 20036

Joseph R. Mazzarella
General Counsel
Connecticut Telephone
1271 South Broad Street
Wallingford, Connecticut 06492

John T. Scott, III